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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

ROBBINS TIRE AND RUBBER COMPANY, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF THE AMICUS CURIAE *

The Chamber of Commerce of the United States is the largest business federation in the United States, with a total membership in excess of 73,000 enterprises and organizations, including chambers of commerce and trade associations, representing businessmen and women throughout the United States. Over 69,000 corporations, partnerships, proprietorships, and individuals engaged in professions are direct business members of the National Chamber; and 83 percent of the members are small businesses, each employing 100

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* Pursuant to Rule 42, all parties have granted permission for the filing of this brief *amicus curiae*.

or fewer employees. The Chamber regularly represents its members' interest in a broad spectrum of matters of critical importance to the business community, including participation as an *amicus curiae* in cases before this Court.[1]

The questions presented in this case, whether witness statements given to the National Labor Relations Board are exempt from disclosure pursuant to exemptions 7 and 5 of the Freedom of Information Act, as amended,[2] is a matter of vital concern to the Chamber and its members. The Chamber has supported the principles of the Freedom of Information Act (FOIA) since its inception.[3] Moreover, the issue presented here is not new to the Chamber in view of its participation in *Title Guarantee Insurance Co.* v. *National Labor Relations Board,* 534 F.2d 484 (2nd Cir.), cert. denied,

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[1] *E.g., United States* v. *United States Gypsum Co.,* No. 76-1560; *Malone* v. *White Motor Corp.,* No. 76-1184; *New York Telephone Co.* v. *New York,* No. 77-961; *Connell Construction Co., Inc.* v. *Plumbers and Steamfitters Local Union 100,* 421 U.S. 616 (1975); *Gateway Coal Company* v. *United Mine Workers of America,* 414 U.S. 268 (1974); *NLRB* v. *Sears Roebuck & Co.,* 421 U.S. 132 (1975).

[2] 5 U.S.C. 552 *et seq.* (1976).

[3] A free flow of information from and concerning all branches of government at all levels is a right of the public and is essential to our democratic society.

• • •

Except for matters clearly affecting national security or otherwise covered by statute, all business of government should be fully disclosed to the public. The burden of proof must rest with government in every instance to justify withholding any information from the public.

From *Policy Declarations* adopted by the Chamber of Commerce of the United States, October 1975.

429 U.S. 834 (1976); and related FOIA cases, *NLRB* v. *Sears Roebuck, supra.; Automobile Club of Missouri* v. *NLRB,* 84 LRRM 2423 (D.C. Cir.).

The arguments put forth by the Board for reversing the decision below would, if adopted by this Court, result in a substantial interference with the intent of Congress in adopting the 1974 amendments to the Freedom of Information Act, and a return to the "wooden and mechanical standards" of applying FOIA exemptions which existed prior to the 1974 amendments. *McDonnell Douglas Corp.* v. *National Labor Relations Board,* unofficially reported at 92 LRRM 2072, 2074 (C.D. Ca. 1976). Accordingly, the Chamber submits this brief *amicus curiae* in support of affirmance of the decision of the U.S. Court of Appeals for the Fifth Circuit below.

SUMMARY OF ARGUMENT

The District Court and Court of Appeals below, in response to Robbins Tire and Rubber Company's (hereafter "Robbins") FOIA request of the Board for statements of witnesses to be called to testify at an unfair labor practices hearing, ordered the Board to turn over those statements to Robbins five days prior to the hearing. (A-108-109, 129.)[4] The issues presented are whether exemptions 7 or 5 of the FOIA allow the Board to withhold those statements.[5]

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[4] "A" references are to the Appendix filed with this Court.

[5] As discussed *infra,* the Board's own rules apply a Jencks Act, 18 U.S.C. § 3500(a) (1970), type of procedure to Board proceedings, thereby requiring that all witness statements be turned over to the party after the witness has testified for the Board. Thus, the issue is not whether the documents are to be made available to Robbins, but when. *See* A-64.

The position of the Board that the statements can be withheld is totally unsupported by the basic policy of the Freedom of Information Act, which is to encourage disclosure. That policy is plainly evidenced by the legislative history of the Act, particularly the history of the 1974 amendments. That history also clearly indicates that the burden of proving the applicability of an exemption is on the administrative agency; a burden the Board has not met here. Moreover, the Board's "parade of horribles," which will occur if it must turn over these statements, are totally unsupported in either the record or logic. This conclusion is buttressed by the fact that the Board's own rules require the statements be turned over after the witness has testified. 29 C.F.R. 102.118(b)(1). Finally, there can be no question that the courts have the right to make an *in camera* inspection of the disputed documents as well as a *de novo* determination as to whether the claimed exemptions apply. At the very least, the court must balance the competing interests in determining whether disclosure should be allowed.

Disclosure of the witness statements five days earlier than Board rules allow, as ordered by the court below, would not interfere with the Board's enforcement proceeding within the meaning of Exemption 7. It is equally clear that the witness statements are not "inter-agency or intra-agency memorandums or letters" within the meaning of Exemption 5. Accordingly, the decision below should be affirmed.

ARGUMENT

The Legislative History Provides the Basis for Rejection of the Board's Contentions.

The legislative history of FOIA, and in particular the 1974 amendments, demonstrates the strong Congressional policy in favor of disclosure. In light of this policy, it becomes difficult to accept the Board's narrow reading of the Act's disclosure requirements and the Board's broad reading of the Act's exemptions. Prior to 1966 when the Freedom of Information Act was passed, the sole statutory provision providing for public disclosure of agency information was section 3 of the Administrative Procedure Act. 5 U.S.C. § 1002 (1964 ed.). However, these disclosure provisions were vague and contained numerous loopholes upon which the agencies consistently relied.* It is not surprising, therefore, that "Section 3 was generally recognized as falling far short of its disclosure goals and had come to be looked upon more as a withholding statute" (citations omitted). ***Environmental Protection Agency v. Mink***, 410 U.S. 73, 79 (1973).

In response to widespread public displeasure over government secrecy and demands for more open government, Congress amended the Administrative Procedure Act in 1966 by passing the Freedom of Information Act. 80 Stat. 251. The Act greatly expanded the availability of information by making it available to "any person," and by mandating that information be released unless it met one of nine concrete exemp-

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* Section 3 stated in relevant part:

> Matters of official record shall in accordance with published rule be made available to persons propely and directly concerned except information held confidential for good cause found.

tions. *EPA* v. *Mink, supra,* at 79; *Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Source Book: Legislative History, Texts and other Documents,* Joint Committee Print, 94th Cong., 1st Sess. (G.P.O. 1975), p.3 (hereinafter, "Source Book"). "The Act reflected 'a general philosophy of full agency disclosure.'" *Department of Air Force* v. *Rose,* 425 U.S. 352, 360-361 (1976), quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Moreover, the Act required reviewing courts to "determine the matter *de novo and the burden is on the agency to sustain its action.*" 5 U.S.C. § 552(a)(3) (1966) (emphasis added).

Exemption 7 of the 1966 Act provided for the nondisclosure of "investigatory files compiled for law enforcement purposes *except to the extent available by law to a party other than an agency*" (emphasis added). Despite contrary legislative history, the courts read this exemption broadly, denying various requests for both open and closed investigatory files. *See, e.g., Bristol-Myers Co.* v. *FTC,* 424 F.2d 935 (D.C. Cir.), *cert. denied,* 400 U.S. 824 (1970); *Evans* v. *Department of Transportation,* 446 F.2d 821 (5th Cir. 1971), *cert. denied,* 405 U.S. 918 (1972); *Frankel* v. *SEC,* 460 F.2d 813 (2nd Cir.), *cert. denied,* 409 U.S. 889 (1972). *See generally,* Note, *Backdooring the NLRB: Use and Abuse of the Amended FOIA for Administrative Discovery,* 8 Loyola Univ. L.J. 149-156.

Beginning in 1973, the United States Court of Appeals for the District of Columbia Circuit decided three cases in which they denied information requests through a strict interpretation of exemption 7. *Aspin* v. *Department of Defense,* 491 F.2d 24 (D.C. Cir. 1973); *Ditlow* v. *Brinegar,* 494 F.2d 1073 (D.C. Cir.) (*per curiam*), *cert. denied,* 419 U.S. 974 (1974); *Center for National Policy Review* v. *Weinberger,* 502 F.2d 370 (D.C. Cir. 1974). The approach taken in these cases was later criticized by Congress as a "stone wall" and "wooden and mechanical."[1] In *Ditlow,* the District of Columbia Circuit demonstrated this approach:

> [I]f the documents in issue are clearly to be classified as 'investigatory files compiled for law enforcement purposes,' the exemption attaches, and it is not in the province of the courts to second-guess the Congress by relying upon considerations which argue that the Government will not actually be injured by revelation in the particular case. 494 F.2d at 1074.

As one commentator has stated:

> Such literal readings of the investigatory files exemption ignored both the reasons behind the exemption and the interests in favor of disclosure. The courts had fashioned a mechanical test from the literal language of the statute and thereby reduced the relevant scope of inquiry to a finding that materials sought were within or beyond the scope of the ambit of the exemption.

Backdooring the NLRB, supra at 155.

These decisions finally forced Congress to clarify the intended scope of the Act and exemption 7 in particular. *McDonnell Douglas Corp.* v. *NLRB, supra* unofficially reported at 92 LRRM 2072, 2074.

In doing so, Congress plainly stated that the decisions broadly construing exemption 7 and using a mechanical approach were contrary to the intent of Congress

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[1] 120 Cong. Rec. S. 9329-30 (Senator Hart) and S. 9331 (Senator Kennedy), May 30, 1974.

[S. Rep. No. 854, 93rd Cong., 2nd Sess. 6 (1974) and that the amendments were designed to overrule *Aspin, Ditlow* and *National Center*. (Source Book at 349.)

Exemption 7(a) was reworded as follows:

> (b) This section does not apply to matters that are
>
> (7) investigatory records compiled for law enforcement purposes but only to the extent that the production of such records would
>
> (A) interfere with enforcement proceedings.

In addition to rewording exemption 7, Congress provided for the use of *in camera* inspections of disputed documents thereby permitting the reviewing court to make a *de novo* determination. 5 U.S.C. 552(a)(4)(B).[8] Moreover, Congress continued the requirement that the agency relying on an exemption had the burden of proving its applicability.[9] Thus, Congress in-

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[8] 5 U.S.C. 552(a)(4)(B) (1976) provides in relevant part:

> In such a case the court shall determine the matter *de novo* and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (h) of this section, and the burden is on the agency to sustain its action.

[9] Id.

One comentator has summarized the changes which are particularly applicable here:

> First, Congress sought to exclude as a basis for exemption generalized assertions that confidential sources or investigative procedures would be compromised. Second, it changed the focus of the inquiry from a broad view of 'investigatory files' to a narrower concern with particular 'investigatory records.'

tended for the amended Act to provide for the fullest possible disclosure with the exemptions interpreted strictly. *Department of Air Force* v. *Rose, supra* at 360-361, 366.

The Board Has Failed to Prove that Release of the Witness Statements Would Interfere with the NLRB Proceeding.

The Board conveniently ignores the statutory requirements that exemptions be determined on a case-by-case basis with a reviewing court making a *de novo* determination.[10] As Senator Hart stated during the debates:

> Our amendment is broadly written and when any one of the reasons for nondisclosure is met, the material cannot be and ought not be exempt merely because it can be categorized as an investigatory file compiled for law enforcement purposes. Source Book 332-333.

Recognition of this legislative intent has been evidenced by a recent opinion of the Court of Appeals for the Fourth Circuit:

> It is manifest from this legislative history that Congress intended to proscribe the use of a mechanical test such as that enunciated in *Title Guarantee* in favor of 'a case-by-case' factual inquiry in determining whether to require disclosure of

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> Third, it emphasized that the 'Government . . . would have to *show* that disclosure *would* result in a specified statutory harm. This makes the burden of proof provisions of amended section 552(a)(4)(B) applicable to exemption 7.

Backdooring the NLRB, supra at 162.

[10] *See Charlotte Mecklenburg Hospital Authority* v. *Perry*, C.A. 4, Nos. 76-2272 and 2273, Jan. 26, 1978, unofficially reported at 16 FEP Cases 680, 685; *Title Guarantee Insurance Corp.* v. *NLRB*, 407 F. Supp. 498, 504 (1975), rev'd 534 F.2d 484 (2nd Cir. 1976).

investigatory records. *Charlotte-Mecklenburg Hospital Authority* v. *Perry,* C.A. 4, Nos. 76-2272 and 2273, Jan. 26, 1978, unofficially reported at 16 FEP Cases 680, 685.[11]

Here, the assertions of the Board ignore each and every change that Congress made in the FOIA.[12]

In the first instance, the Board incredibly has attempted to wrap its obstanate behavior in the cloak of Congressional intent, which expression of the will of Congress, as discussed above, is contrary to the Board's position. As Judge Hancock noted below:

> It is important to note that the Board does not claim that there is something unusual about the affidavits or statements, or that there is something within them that would cause them to be anything other than an average statement obtained during a routine investigation. *The Board's attorney stated* during the oral hearing on April 15, 1976, *that, for the purposes of deciding this case, the court could assume that the Board's position is predicated simply upon the fact that the statements were obtained in connection with a pending matter* (A-62) (emphasis added).

Thus, the Board contends that all witness statements are automatically exempt in all proceedings without regard to the Board's ability to establish in *that particular proceeding* that interference with the enforcement proceeding would occur.

In this regard, the Board makes generalized assertions of interference without presenting a scintilla of evidence that such interference would take place in this proceeding. *See, McDonnell Douglas Corp.* v. *NLRB, supra* at 2074. It has not even submitted the statements to the court for an *in camera* inspection so that, at the very least, the court could determine if any portion of the statements are favorable to Robbins.

In this regard, the Board argues strenuously that release of the witness statements five (5) days prior to the hearing would result in intimidation or harassment of witnesses (Bds. br. 13-15, 25). This contention impermissably reverses the burden of proof from that required in the statute. By requiring Robbins to prove that they would not interfere with the proceeding (*i.e.,* the witnesses), the Board has attempted to shed itself of the burden of proving that *Robbins would* interfere with the proceeding. Furthermore, the Board suggests that this Court must presume *in the absence of any evidence* that Robbins will violate Section 8(a)(4) of the National Labor Relations Act,[13] as interpreted by this Court in *NLRB* v. *Scrivener,* 405 U.S. 117. We suggest that in the absence of evidence to the contrary, it must be presumed that citizens obey laws rather than violate them.

Furthermore, we suggest that it is unrealistic to suggest that most respondents in Board proceedings would attempt to intimidate or harass witnesses five (5) days before a hearing. Evidence of such harassment pre-

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[11] The Board states in its brief its belief that Congress, in enacting the 1974 amendments, did not intend to overrule decisions such as the Fourth Circuit's in *Wellman Industries, Inc.* v. *NLRB,* 490 F.2d 427. It is significant that in *Charlotte-Mecklenburg, supra,* the Fourth Circuit states that Congress' dissatisfaction with *Wellman,* as well as other cases, motivated Congress to rewrite exemption 7. *But see, Deering Milliken, Inc.* v. *Irving,* 548 F.2d 1731 (C.A. 4).

[12] See Footnote 9, *supra.*

[13] 29 U.S.C. 158(a)(4) (1973).

sented at the hearing would more than likely result in the employer losing his case.

In addition, the Board continually ignores the facts that Robbins requested and the court below ordered the Board to turn over only the statements of those persons who would be witnesses at the hearing five (5) days later and that the Board's own rules require that the statements be turned over at the hearing. Thus, the Board states that "many persons [presumably in future cases] would be reluctant to volunteer information to Board investigators if they know that their names or the information they provide will be revealed . . ." (Br. p. 17). In light of the fact that under the Board's present procedures the statements would be turned over at the hearing, it is difficult to find a rational basis for the Board's fear that persons would be more reluctant to volunteer information than they presently are. See, *Goodfriend Western Corp.* v. *Fuchs,* 411 F. Supp. 454, 458 (D. Mass.), rev'd 535 F.2d 145 (1st Cir.) *cert. denied,* 45 U.S.L.W. 3306 (1976).

Similarly, the Board argues that the chilling effect of its own disclosure rule is minimized (as compared to the disclosure required by the court below) by the fact that the "majority of unfair labor practice proceedings are disposed of without hearing, and that most persons who give such statements are never called upon to testify." (Br. 17) Seemingly, the Board ignores the requirement of the court below that *only* statements of those who testify would have to be disclosed, and the statements of those who do not testify could be kept confidential.

The Board's assertions that all witness statements in its proceedings are entitled to a blanket exemption

from FOIA disclosure requirements without benefit of *in camera* inspection, ignores the fact that *in camera* inspection would reveal information highly relevant to the question of whether interference is likely to result. Cf. *Charlotte-Meckenburg Hospital Authority* v. *Perry, supra.* Thus, *in camera* inspection might reveal whether employees or others had given the statements, whether the statements are favorable or unfavorable to the employer, and in general the likelihood of retaliation, based on the contents of the statements. See *Temple-Eastex* v. *NLRB,* 410 F. Supp. 183, 186 (E.D. Tex. 1976).

Moreover, coupled with the court's examination of the statements, it could consider probative evidence of the likelihood of interference with the enforcement proceeding by that employer. Such evidence might include the respondent's past record of unfair labor practices, including whether he has previously violated section 8(a)(4) of the NLRA.[14]

The Scope of the Board's Discovery Rules Is Not Relevant to an FOIA Proceeding.

In support of its position that it does not have to disclose the witness statements, the Board places heavy reliance on its somewhat archaic discovery rules. In so doing, the Board notes that disclosure of the witness statements would give the party greater access than available under Board procedures. (Br. 24, 43.)

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[14] Of course, as discussed *supra,* the Board has the burden of proving the likelihood of interference in the particular proceeding. Where, as in this case, the Board has presented no evidence, disclosure must be ordered.

While the extent of discovery allowed by the Board's rules is admittedly almost nonexistent, the scope of those rules is irrelevant. *NLRB* v. *Sears Roebuck*, 421 U.S. 132, 143, fn. 10 (1975). The statute mandates disclosure of information "to any person." 5 U.S.C. § 552 (a)(3) (1976). In *Sears*, the employer was also the charging party in a Board proceeding at the time it filed its FOIA request. This Court stated:

> *Sears' rights under the Act are neither increased nor decreased by reason of the fact that it claims an interest [in the requested material] greater than that shared by the average member of the public.* The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants. [Citations omitted.] Accordingly, we will not refer again to Sears' underlying unfair labor practice charge. *Sears, supra.*[15]

When an exemption from disclosure under section 7 is claimed, the relevant consideration is not whether the agency would have disclosed the information prior to the advent of the Freedom of Information Act, since such an interpretation would make the Act irrelevant.

[15] In *Cessna Aircraft Co.* v. *NLRB*, 405 F. Supp. 1042, 1046, (D. Kan. 1975), rev'd 542 F.2d 834 (10th Cir. 1976), the court stated, relying on *Sears:*

> This is not an action to review decisions of the Board regarding discovery matters which may or may not arise during the hearing in controversy now before that Board. This is a separate and distinct action to enforce provisions of the Freedom of Information Act, whose benefits are available to any person. The Board cannot seriously contend that it is somehow exempt from provisions of the Act, or that its internal rules and regulations regarding discovery may apply to nullify provisions of that Act, or that plaintiff here, simply because it is engaged in litigation before the Board, is relegated to lesser status than general members of the public.

Rather, as exemption 7 states, the relevant inquiry is whether disclosure will substantially interfere with the enforcement proceeding.[16]

The Board's Reliance on Title Guarantee is Misplaced.

The Board correctly notes that the Second Circuit's decision in *Title Guarantee Co.* v. *NLRB*, 534 F.2d 484, *cert. denied*, 429 U.S. 834 (1976) is the leading case in support of its decision.[17] Accordingly, the Board places heavy reliance on it.

However, that case is clearly distinguishable on the facts from that presented here. In *Title Guarantee*, the employer requested all written statements, signed or unsigned, without regard to whether the person giving those statements would testify at a subsequent Board hearing. *Title Guarantee* at 486. Such a request is plainly distinguishable from the one in the instant case where Robbins sought only the statements of witnesses who would testify at a hearing five (5) days later, where the statements would be turned over pursuant to the Board's own rules.

As the court below stated in distinguishing *Title Guarantee:*

> . . . Title Guarantee involved a request for copies of all statements, without regard to whether the

[16] Prior to the 1974 amendments, the availability of documents to a private litigant before the agency was a relevant concern since investigatory files were not available "except to the extent they were available by law to a private party." S. Rep. No. 813, 89th Cong., 1st Sess. § 9 (1965). However, this language was dropped when the statute was amended.

[17] The Fifth Circuit below, and the Fourth Circuit in *Charlotte-Mecklenburg, supra*, have both expressly declined to follow *Title Guarantee.*

affiants would be called to testify. Part of the rationale for denying the right to disclosure was the 'delicate relationship which exists between employer and employees.'

* * *

There is inherent in this concern an assumption that the Board would be unable to obtain testimony from employees to aid in its prosecution if their statements would become the knowledge of their employer. Even discounting the problem that we do not know which of the affiants here are employees, this sweeping assumption of intimidation is inappropriate here, where the request is limited to statements of witnesses. (A-118; citations and footnotes omitted.)

In any event, we submit that the Second Circuit's decision is incorrect and runs directly contrary to the legislative history. (A-112, 113-121.) *Charlotte-Mecklenburg Hospital Authority* v. *Perry, supra,* at 685.

The Second Circuit applies exactly the "wooden and mechanical" test which Congress rejected in enacting the 1974 amendments. *See,* p. 7, *supra.* The Court eschews the *in camera* inspection permitted by the Act as well as the case by case approach so strongly supported by the legislative history. *Title Guarantee, supra,* at 490. As the Fifth Circuit noted below, if this had been the sole purpose of the 1974 amendments to exemption 7, Congress could very easily have amended the statute to require disclosure of only closed investigatory files.[18] (A-112, footnote 8.) Instead, Congress

[18] *See,* Note, The Impact of the FOIA on NLRB Discovery Procedures, 10 Michigan Journal of Law Reform, 493 (Spring, 1977). Cited with approval, *Charlotte-Mecklenburg Hospital Authority* v. *Perry, supra.*

wrote exemption 7(A) so that while it was implied that it only applied to open cases, the agency had the burden of showing that disclosure would interfere with that enforcement proceeding.

Affirmance of the Fifth Circuit's Decision Would Not Delay Board Proceedings.

The Board asserts that reviewing requests for disclosure on a case by case basis would unduly delay Board enforcement proceedings. (Br. 41.) This fear is unjustified. If the decision of the Fifth Circuit is affirmed, the courts will quickly establish standards to be applied in determining whether exemption 7 is applicable. These standards will be "perceptible to the NLRB and counsel for charged parties." Note, Michigan Journal of Law Reform, *supra* at 494. Thus, the parties knowing under what circumstances witness statements will be available, will seldom resort to litigation." *Id.*

Exemption 5 Is Inapplicable to the Requested Witness Statements.

Exemption 5 of the FOIA exempts from disclosure "*inter-agency or intra-agency memorandums or letters* which would not be available to a party other than an agency in litigation with the agency." (Emphasis added.) Thus, in order to come within the exemption, materials must first be inter-agency or intra-agency memoranda or letters. *General Services Administration* v. *Benson,* 415 F.2d 878, 880 (9th Cir. 1969). Clearly, the witness statements requested by Robbins do not fit in this category. *Temple-Eastex, Inc.* v. *NLRB, supra,*

410 F. Supp. 183, 185 (E.D. Tex. 1976);[19] *Title Guarantee, supra* at 492-93 n.15 (dictum); *Deering Milliken, Inc.* v. *Irving,* 548 F.2d 1131, 1138 (4th Cir. 1977); *Marathon Le Tourneau Co.* v. *NLRB,* 414 F. Supp. 1074, 1080 (S.D. Miss. 1976).

Exemption 5 exempts "those documents and only those documents, normally privileged in the civil discovery context." *NLRB* v. *Sears, Roebuck & Co., supra* at 149. In passing exemption 5, Congress had in mind the government's "executive privilege," and the attorney's "work product" rule enunciated in *Hickman* v. *Taylor,* 329 U.S. 495 (1947). *NLRB* v. *Sears, supra* at 150, 154.

The House Report noted that in the absence of the rule

> a full and frank exchange of opinions would be impossible if all internal communications were made public. [Agency witnesses] contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to operate in a fishbowl. H. R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted* in [1966] *U.S. Code and Cong. & Admin. News,* pp. 2418, 2427.

The witness statements sought here do not fit within either category.

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[19] The Court in *Temple-Eastex* stated:

> Both the prefixes 'inter' and 'intra' imply that the communication involved was transmitted from one government employee to another. Sworn statements by persons interviewed by the NLRB are not of this character. No deliberative processes are evidenced by them. *See Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 90 (1973).

The executive privilege is designed to protect the "decision making processes of government." *Tennessean Newspapers, Inc.* v. *FHA,* 464 F.2d 657, 660 (6th Cir. 1972), cited with approval, *NLRB* v. *Sears, Roebuck & Co., supra* at 150; *see also, EPA* v. *Mink, supra* 410 U.S. 73, 93 (1973). Pursuant to the executive privilege embodied in exemption 5, this Court has held that an agency is entitled to withhold from disclosure "intra-agency advisory opinions," and other information reflecting "deliberative or policy making processes." *EPA* v. *Mink, supra,* at 86-89; quoted in *Deering Milliken* v. *Irving,* 548 F.2d 1131, 1137 (4th Cir. 1977). However, this Court has also held that this privilege does not encompass compiled factual material or purely factual material contained in otherwise exempt deliberative memoranda where the factual material can be severed from the memoranda. *NLRB* v. *Sears* at 87-88; *Deering Milliken* v. *Irving, supra* at 1137-1138; *Soucie* v. *David,* 448 F.2d 1067, 1077 (D.C. Cir. 1971).

The witness statements sought here are clearly not the type of memoranda or letters referred to in exemption 5. *Title Guarantee* v. *NLRB, supra.* 407 F. Supp. 498, 502 (S.D. N.Y.), *rev'd on other grounds,* approved *in dictum,* 534 F.2d 484, n.15 (2nd Cir. 1976). Rather, it is purely factual material which would not be subject to the executive privilege. *Id.*

The Board contends that the factual-deliberative distinction does not apply to the attorney's work product privilege (Br. 49), and that the witness statements are exempt under that privilege. The Board's argument is without merit. In the first place, it ignores the requirement that the materials be inter- or intra-agency memoranda or letters. Secondly, and more impor-

tantly, the legislative history and the case law are unwavering in their requirement that materials exempt from disclosure under exemption 5 be deliberative and not merely factual. *Title Guarantee* v. *NLRB, supra* at 502-503; *Deering Milliken* v. *Irving, supra* at 1138; cf. *EPA* v. *Mink, supra* at 89; *Soucie* v. *David, supra.* Inasmuch as the witness statements sought by Robbins do not come within either the executive privilege or the attorney-work product privilege, the exemption is not applicable.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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